

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 28, 2006 Session

**DAVID EDWARD BERLEUE v. TENNESSEE BOARD OF PROBATION
AND PAROLE**

**Direct Appeal from the Chancery Court for Davidson County
No. 02-1081-I Claudia Bonnyman, Chancellor**

No. M2005-00363-COA-R3-CV - Filed on June 5, 2006

This appeal stems from a denial of a petition for writ of certiorari. In this appeal, we are asked to determine whether the actions of the Tennessee Board of Probation and Parole were fraudulent, arbitrary, or illegal when it denied the parole of an incarcerated offender and when it set the offender's next parole hearing date five years after his initial parole date. On appeal, the offender maintains that the actions and statements of the board member conducting his parole hearing violated his due process right to a meaningful hearing and that the denial of parole violated his liberty interest in parole because the board did not follow the parole procedures in effect when he was incarcerated. Further, the offender asserts that the board's five year deferral of his next parole hearing was arbitrary pursuant to *Baldwin v. Tennessee Board of Paroles*, 125 S.W.3d 429 (Tenn. Ct. App. 2003). We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and DONALD P. HARRIS, S.J., joined.

Russ Eagle, Murfreesboro, TN, for Appellant

Paul G. Summers, Attorney General & Reporter, Michael Moore, Solicitor General, Pamela S. Lorch, Senior Counsel, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

In 1979, David Edward Berleue (“Berleue”) was convicted of first degree murder. Berleue was sentenced to life in prison with the possibility of parole at a range of 30 percent. After serving 22 years in prison, Berleue appeared before the Tennessee Board of Probation and Parole (the “Board”) on October 2, 2001. William T. Anderson (“Anderson”), a member of the Board, conducted the parole hearing. During the hearing, Anderson made a comment that neither he nor any other Board member would grant parole to Berleue at his first opportunity for parole.

In its Notice of Board Action, the Board denied Berleue’s request for parole and set his next parole hearing date for five years after the initial hearing date. In the notice, the Board stated that the reason that it denied his parole was because his “release from custody at this time would [d]epreciate the seriousness of the crime of which the offender stands convicted or promote [d]isrespect of the law.” Thereafter, Berleue appealed the decision to the Board, which was denied in a letter dated February 14, 2002.

Berleue then filed a petition for writ of certiorari in the chancery court. On November, 9, 2004, the chancery court denied Berleue’s petition for certiorari finding that the Board did not act illegally, fraudulently, or arbitrarily in its decision to deny Berleue’s request for parole and that the Board’s decision to set Berleue’s next parole hearing in five years was not an arbitrary decision.

II. ISSUES PRESENTED

Berleue has timely filed his notice of appeal and presents, as we perceive them, the following issues for review:

1. Whether the chancery court erred in upholding the Board’s decision denying his request for parole; and
2. Whether the chancery court erred in finding that the decision of the Board to deny Berleue further parole consideration for five years was not arbitrary.

For the following reasons, we affirm the decision of the chancery court.

III. STANDARD OF REVIEW

The scope of review under the common law writ [of certiorari] . . . is very narrow. It covers only an inquiry into whether the Board has exceeded its jurisdiction or is acting illegally, fraudulently, or arbitrarily, *Yokley v. State*, 632 S.W.2d 123 (Tenn. App. 1981). Conclusory terms such as “arbitrary and capricious” will not entitle a petitioner to the writ. *Id.* At the risk of

oversimplification, one may say that it is not the correctness of the decision that is subject to judicial review, but the manner in which the decision is reached. If the agency or board has reached its decision in a constitutional or lawful manner, then the decision would not be subject to judicial review.

Powell v. Parole Eligibility Review Bd., 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). Review is “limited to the record made before the lower tribunal or board.” ***Flautt & Mann v. Council of the City of Memphis***, No. W2004-01188-COA-R3-CV, 2005 Tenn. App. LEXIS 235, at *32 (Tenn. Ct. App. Apr. 22, 2005) (citing *421 Corp. v. Metro. Gov’t of Nashville & Davidson County*, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000)). “It envisions that the court will review the record independently to determine whether it contains ‘such relevant evidence that a reasonable mind might accept as adequate to support a rational conclusion.’” ***Lafferty v. City of Winchester***, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000) (quoting *Hedgepath v. Norton*, 839 S.W.2d 416, 421 (Tenn. Ct. App. 1992)). “On the issue of whether material evidence exists to support the decision of the lower tribunal or board, the reviewing court is prohibited from receiving new or additional evidence.” ***Flautt & Mann***, 2005 Tenn. App. LEXIS 235, at *32-33 (citations omitted). However, new or additional evidence may be received when deciding “whether the lower tribunal or board exceeded its jurisdiction or acted in an illegal, arbitrary, or capricious manner.” ***Id.*** at *33-34 (citations omitted). When a court reviews the evidentiary basis for a decision of a lower tribunal or board, “the question of whether the record contains material evidence to support the board’s decision becomes a question of law.” ***Id.*** at *33 (citations omitted).

IV. DISCUSSION

A. Parole Denial

On appeal, Berleue asserts that the manner of the parole hearing conducted by the Board violated his right to due process. Specifically, Berleue asserts that he was not given a meaningful hearing because of Anderson’s bias through his statements and actions at the parole hearings. Further, Berleue asserts that he was denied a state created liberty interest when the Board denied his parole because it failed to follow its own rules and statutes governing parole hearings. We disagree.

1. Meaningful Hearing

On appeal, Berleue contends that he was not given a meaningful hearing because Anderson had a preconceived bias against Berleue as shown through Anderson’s statements at the parole hearing. At the hearing, Anderson did make a comment that neither he nor the other members of the Board would parole Berleue at his first opportunity for parole. Although Anderson did make this statement at Berleue’s parole hearing, in the Board’s order denying parole, the Board denied Berleue parole because his release would depreciate the seriousness of the offense and promote disrespect for the law.

Section 40-35-503(b) of the Tennessee Code states:

Release on parole is a privilege and not a right, and no inmate convicted shall be granted parole if the board finds that:

- (1) There is a substantial risk that the defendant will not conform to the conditions of the release program;
- (2) The release from custody at the time would depreciate the seriousness of the crime of which the defendant stands convicted or promote disrespect for the law;
- (3) The release from custody at the time would have a substantially adverse effect on institutional discipline; or
- (4) The defendant's continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance the defendant's capacity to lead a law-abiding life when given release status at a later time.

Tenn. Code Ann. § 40-35-503(b) (2001). The reasoning employed by the Board for denying Berleue's request for parole is one of several statutory reasons why a board may deny a prisoner parole. *See* Tenn. Code Ann. § 40-35-503(b)(2). Given the nature of the crime involved and the seriousness of that offense, there is material evidence to support this finding.

Further, Berleue contends that Anderson's actions at the parole hearing precluded him from having a meaningful hearing. Although Berleue contends that Anderson cut short the witnesses supporting his release and did not allow him to present evidence at the hearing, upon our review of the record, we find the opposite. Anderson allowed everyone who wished to speak on behalf of Berleue to speak, and at the end of the testimonials, he offered Berleue a chance to speak on his own behalf, which Berleue declined to do.

Additionally, Berleue contends that he was not given a meaningful hearing because the Board failed to take into consideration his parole prediction score. However, there is nothing in the record to indicate that the Board failed to do so.

2. Liberty Interest

Second, Berleue asserts that he was denied a state created liberty interest when the Board failed to follow its own rules and regulations as well as the statutes governing parole hearings. Berleue contends that the Board should have used the rules and regulations in place when he was convicted.

Although "provisions for determining what proportion of a maximum sentence an offender must serve before becoming eligible for release" are considered a part of the law annexed to a prison sentence at the time of sentencing, parole procedures are not considered a part of the law annexed. *Miller v. Tenn. Bd. of Prob. & Parole*, 119 S.W.3d 696, 701 (Tenn. Ct. App. 2003). As such, the

Board was bound to apply the rules and regulations in place at the time of Berleue's hearing and not at the time of his conviction.

After a review of the procedures implemented at Berleue's hearing, we have found no error in the Board's handling of his parole hearing. "Release on parole is a privilege and not a right . . ." Tenn. Code Ann. § 40-35-503(b) (2001). As such, prisoners do not have a liberty interest in parole. However, "the Board of Paroles is obligated to follow the laws of the State of Tennessee as well as its own rules, and that inmates are entitled to whatever due process arises as a result of the proper application of the state statutes and the rules." *Wells v. Tenn. Bd. of Paroles*, 909 S.W.2d 826, 829 (Tenn. Ct. App. 1995).

Upon our review of the record, we conclude that the Board properly conducted Berleue's parole hearing according to its rules and regulations as well as the statutes governing parole hearings.¹ Accordingly, we affirm the decision of the chancery court finding that the Board acted properly in denying Berleue parole.

B. Parole Hearing Date

Finally, on appeal, Berleue contends that the Board's decision to set his next parole hearing five years later was arbitrary. We disagree.

In *Baldwin v. Tennessee Board of Paroles*, 125 S.W.3d 429 (Tenn. Ct. App. 2003), this Court found that the Tennessee Board of Paroles' decision to set a prisoner's next parole hearing date twenty years after his initial hearing was arbitrary. *Id.* at 434-35. In that case, we found that, by doing so, the Tennessee Board of Paroles precluded the current board from rehearing the prisoner's subsequent petition for parole and precluded subsequent future boards from making a decision as to whether the prisoner would be a suitable candidate for parole as board members because of the length of their appointments.² This Court also noted that such "deferral would undermine the very provisions of the parole statutes that empower the Board to grant parole." *Id.* at 434. Further, we found that the board's decision would have the effect of changing the prisoner's sentence to life without parole. *Id.* Likewise, in *York v. Tennessee Board of Probation & Parole*, M2003-00822-COA-R3-CV, 2004 Tenn. App. LEXIS 100 (Tenn. Ct. App. Feb. 17, 2004), this Court applied the

¹ Berleue has asserted his due process rights were violated because the Board failed to give reasons why it found that his release would depreciate the seriousness of the offense and promote disrespect for the law. Section 40-35-503(b) of the Tennessee Code mandates that the Board may deny parole if it finds that release would depreciate the seriousness of the offense and promote disrespect for the law. Tenn. Code Ann. § 40-35-503(b) (2001). It does not require that the Board give reasons for its findings. Nor can we find any parole procedure that would require such action by the Board.

² In finding so, this Court noted that the members of the board are appointed for staggered six year terms and are eligible for but not entitled to reappointment. We concluded that it was entirely possible that "the entire membership of the Board can completely turn over more than once before [the prisoner's] case comes up for decision once again." *Baldwin*, 125 S.W.3d at 434.

same rationale as in *Baldwin* and found that a ten year lapse between parole hearings was arbitrary. *Id.* at *12-13.

In this case, the Board set Berleue's hearing date five years after his initial hearing. Applying the same rationale that we utilized in *Baldwin*, we cannot say that a five year lapse between parole hearings was arbitrary. Here, one or more Board members that considered Berleue's first parole hearing could reconsider his next parole request. Further, a lapse of five years would not preclude subsequent Board members from hearing Berleue's petition. Given the serious nature of the offense Berleue committed, his sentence of life in prison with the possibility of parole, and the fact that he had already served twenty-two years at the time of the hearing, an addition of five years would not have the effect of changing his sentence to a life sentence without parole. Given the facts in this case, a five year lapse between hearing dates does not undermine the parole statutes or the Board's power to parole. Thus, we conclude that, under these circumstances, a five year lapse between parole hearings was not arbitrary.³ Accordingly, we affirm the portion of the chancery court's decision finding that the Board acted properly in deferring Berleue's next parole hearing five years after his initial hearing.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the chancery court denying Berleue's petition for writ of certiorari. Costs of this appeal are taxed to the appellant, David Edward Berleue, and his surety, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE

³ On appeal, Berleue has also asserted that the Board should have applied the parole procedures in effect at the time of his conviction, which would entitle him to annual reviews for parole. As we have stated earlier in this Opinion, the parole procedures in effect at the time of the parole hearing are the correct procedures to be used by the Board. Thus, Berleue has no due process interest in annual parole reviews.